Public Prosecutor v Iran bin Sakdon

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 41-30 OF 1997
AUGUSTINE PAUL J
30 APRIL 1998

Criminal Procedure *— Appeal — Sentence, against — Circumstances in which appellate court would interfere with sentence*

Criminal Procedure *— Sentence — Mitigating factors — Plea of guilty — Clean record since last conviction — Gap principle, how activated — Amended charge, whether a factor be considered when assessing sentence*

Criminal Procedure *— Sentence — Police supervision — When to be imposed — Whether order of police supervision to be considered when assessing sentence*

Criminal Procedure *— Sentence — Backdating of sentence to date of arrest — Discretionary power of court — Remand period, how considered in assessing sentence of imprisonment*

The accused was charged in the magistrates' court at Melaka with an amended charge of being in possession of 0.10 grams of morphine in contravention of s 12(2) of the Dangerous Drugs Act 1952. The accused pleaded guilty to the charge and the magistrate therefore accepted his plea. In mitigation, the accused pleaded for leniency in view of his guilty plea. The facts adduced by the prosecution showed that the accused had 22 previous convictions, seven of which were drug related whilst the rest were for theft. The accused's last conviction was also drug related in that he was sentenced to 36 months' imprisonment for possession of dangerous drugs. The prosecution therefore prayed for a deterrent sentence as the previous convictions seemed not to have any effect on the accused. The magistrate convicted the accused and imposed a sentence of 30 months' imprisonment from the date of the accused's arrest to be followed by police supervision for 12 months.

The magistrate advanced five grounds to justify the sentence imposed, namely: (i) the accused had been free from any conviction since his last conviction; (ii) the term of imprisonment ordered was to be followed by an order for police supervision; (iii) the accused had been in remand from the date of his arrest; (iv) the accused's guilty plea saved the time and expense of the court, the prosecution and witnesses; and (iv) the weight of the drugs in the amended charge was lesser than in the original charge. The Public Prosecutor, not satisfied with the reasons given, appealed against sentence to the High Court.

In the High Court, the deputy public prosecutor contended that the reasons given by the magistrate were wrong in law. He contended that the learned magistrate's view that the accused had been free from crime since his last conviction was incomprehensible as the accused was in prison for a greater part of that period. The learned deputy

further submitted that the order for police supervision should not have been considered as a ground for imposing sentence and the manner in which the magistrate treated the accused's period in remand in imposing sentence was wrong. A

Held, allowing the appeal: B

(1) An appellate court will not interfere with the sentence imposed unless the magistrate has proceeded on wrong principles or has given undue weight to some of the evidence. The phrase 'pass sentence according to law' in sub-s 173(b) of the CPC means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see p 508E–H). C

(2) In appropriate cases, the fact that an accused person has had a clean record since his last conviction may operate as a mitigating factor. However, this 'gap' principle is activated only after the termination of the last prison sentence. Thus on the facts, the decision of the magistrate to take into account the period from the date the last prison term was imposed on the accused, in sentencing the accused, was wrong in law (see p 509A–I). D

(3) An order for police supervision can be made in the case of persistent drug offenders. However, it is wrong in law to take an order for police supervision into account when assessing sentence (see p 510B–C); *Re Bakar bin Ahmad* [1959] MLJ 256 followed. E

(4) A consideration of the period in remand in assessing sentence followed by an order that the sentence of imprisonment is to take effect from the date of arrest, as was done in the instant case, is wrong in law as it amounts to double credit being given for the same factor (see p 510G–I). F

(5) A plea of guilt ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. In the instant case, there was virtually no defence available to the accused as the drugs, the subject matter of the offence for which he was charged, were recovered from his pocket. His list of previous convictions also showed that he had exhausted the mitigating factors that he had in his favour (see pp 511A–512A). G H

(6) To treat the exercise of that right of the prosecution to amend the charge — so as to reduce the weight of the drugs in the amended charge — as affecting the sentence to be passed, as was done in the instant case, is a gross miscarriage of justice. The magistrate had thus acted on wrong judicial principles in imposing sentence and the facts called for the maximum term of imprisonment to be imposed (see p 512B–D). I

A [**Bahasa Malaysia summary**

Tertuduh telah didakwa di mahkamah majistret di Melaka dengan tuduhan terpinda untuk milikan 0.10 gram morfin menyalahi s 12(2) Akta Dadah Berbahaya 1952. Tertuduh telah mengaku bersalah kepada tuduhan dan majistret telah menerima pengakuan
B bersalahnya. Semasa hujahan meringankan hukuman, tertuduh telah meminta hukuman ringan memandangkan beliau telah mengaku bersalah. Fakta-fakta yang dikemukakan oleh pihak pendakwa menunjukkan bahawa tertuduh mempunyai 22 sabitan lampau, tujuh daripadanya adalah berkaitan dengan dadah sementara yang lain adalah kerana mencuri. Sabitan terakhir tertuduh juga adalah
C berkaitan dengan dadah di mana beliau telah dihukum penjara selama 36 bulan penjara untuk milikan dadah. Oleh itu, pihak pendakwaan telah memohon untuk hukuman mencegah kerana sabitan-sabitan yang terdahulu seolah-olah tiada kesan terhadap tertuduh. Majistret telah mensabitkan tertuduh dan telah mengenakan hukuman penjara selama 30 bulan dari tarikh tertuduh ditangkap diikuti oleh
D pengawasan polis selama 12 bulan.

Majistret telah mengutarakan lima alasan untuk menjustifikasikan hukuman yang dijatuhkan, iaitu: (i) tertuduh tersebut adalah bebas daripada sebarang sabitan sejak sabitan terakhirnya; (ii) tempoh masa penjara tersebut akan diikuti oleh
E perintah pengawasan polis; (iii) tertuduh ditahan sejak tarikh beliau ditangkap; dan (iv) berat dadah di dalam tuduhan terpinda adalah kurang daripada tuduhan asal. Pendakwa Raya, yang tidak berpuas hati dengan sebab-sebab yang diberikan, telah merayu terhadap hukuman tersebut di Mahkamah Tinggi.

F Di Mahkamah Tinggi, timbalan pendakwa raya menegaskan bahawa sebab-sebab yang diberikan oleh majistret adalah salah di sisi undang-undang. Beliau menegaskan bahawa pendapat majistret bahawa tertuduh adalah bebas daripada jenayah sejak sabitan terakhirnya tidak boleh diterima akal kerana tertuduh berada di dalam penjara untuk jangka masa selama dalam tempoh itu.
G Timbalan tersebut telah berhujah selanjutnya bahawa perintah pengawasan polis tidak patut dipertimbangkan oleh kerana dasar untuk mengenakan hukuman dan juga pendekatan di mana majistret telah pertimbangkan tempoh tahanan semasa mengenakan hukuman adalah salah.

H **Diputuskan**, membenarkan rayuan:

(1) Mahkamah rayuan tidak akan menganggu hukuman yang dijatuhkan melainkan majistret telah menggunakan prinsip-prinsip yang salah atau telah memberikan pertimbangan yang kurang wajar kepada sesetengah keterangan. Ungkapan
I 'menjatuhkan hukuman mengikut undang-undang' di dalam sub-s 173(b) Kanun Acara Jenayah bermaksud bahawa hukuman yang dijatuhkan bukan sahaja diliputi oleh

lingkungan seksyen hukuman tersebut, tetapi mestilah dinilai dan dijatuhkan menurut prinsip-prinsip kehakiman yang mantap (lihat ms 508E–H).

(2) Dalam kes-kes yang sesuai, fakta bahawa tertuduh mempunyai rekod bersih sejak sabitan terakhirnya boleh bertindak sebagai faktor meringankan hukuman. Namun, prinsip 'ruang' ini adalah hanya diaktifkan selepas hukuman penjara tamat. Oleh itu, berdasarkan fakta-fakta, keputusan majistret untuk mengambil kira tempoh dari tarikh hukuman penjara dijatuhkan terhadap tertuduh, semasa menjatuhkan hukuman, adalah salah di sisi undang-undang (lihat ms 509A–I).

(3) Perintah pengawasan polis boleh dibuat terhadap pesalah dadah yang berterusan. Namun, adalah salah di sisi undang-undang untuk mengambil kira perintah pengawasan semasa menaksir hukuman (lihat ms 510B–C); *Re Bakar bin Ahmad* [1959] MLJ 256 diikut.

(4) Pertimbangan tempoh tahanan di dalam menaksir hukuman diikuti oleh suatu perintah bahawa hukuman penjara akan bermula dari tarikh penahanan, seperti yang dibuat di dalam kes ini, adalah salah di sisi undang-undang kerana ia terjumlah kepada pertimbangan baik selama dua kali diberikan kepada faktor yang sama (lihat ms 510G–I).

(5) Suatu pengakuan bersalah hanya patut dipertimbangkan sebagai berpihak kepada tertuduh sahaja apabila semua faktor-faktor dan juga keadaan-keadaan yang mengelilingi perbuatan melakukan jenayah menjustifikasikan pertimbangan tersebut. Di dalam kes ini, tidak terdapat apa-apa pembelaan yang terbuka kepada tertuduh kerana dadah, yang merupakan bahan perkara jenayah tersebut di mana beliau telah dituduh, telah dijumpai di koceknya. Senarai sabitan-sabitannya yang terdahulu juga menunjukkan bahawa beliau telah menghabiskan segala faktor-faktor untuk meringankan hukuman yang berpihak kepadanya (lihat ms 511A–512A).

(6) Dengan mengganggap pelaksanaan hak pihak pendakwaan untuk meminda tuduhan tersebut — untuk mengurangkan berat dadah tersebut di dalam tuduhan yang terpinda — sebagai menjejaskan hukuman yang akan dijatuhkan, seperti yang dibuat di dalam kes ini, adalah suatu salah laksana keadilan yang besar. Dengan itu, majistret tersebut telah bertindak atas prinsip-prinsip kehakiman yang salah di dalam menjatuhkan hukuman dan fakta-fakta memerlukan tempoh hukuman penjara yang maksimum dijatuhkan (lihat ms 512B–D).]

Notes

For cases on sentencing generally, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2213–2674.

Cases referred to

Bakar bin Ahmad, Re [1959] MLJ 256 (folld)
Chang Cheng Hoe & Ors, Re [1966] 2 MLJ 252 (refd)
Lian Kian Boon v PP [1991] 1 MLJ 51 (refd)
PP v Jafa bin Daud [1981] 1 MLJ 315 (refd)
PP v Govindnan a/l Chinden Nair [1998] 2 MLJ 181 (refd)
Philip Lau Chee Heng v PP [1988] 3 MLJ 107 (refd)
R v Layton (1959) Crim LR 61 (refd)
R v Leo De Cruz [1935] MLJ 1 (refd)
R v Newman (1959) Crim LR 138 (refd)
R v Teo Cheng Lian [1949] MLJ 170 (refd)
R v Yakimovitch (1960) Crim LR 66 (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134 (refd)
Sia Ah Kew & Ors v PP [1974] 1 MLJ 125 (refd)
Sinniah Pillay v PP [1992] 1 SLR 225 (refd)
Zaidon Shariff v PP [1996] 4 CLJ 441 (refd)

Legislation referred to

Criminal Procedure Code s 282(d)
Dangerous Drugs Act 1952 s 12(2)

Anslem Charles Fernandis (Deputy Public Prosecutor) for the appellant.
Accused in person.

Augustine Paul J: The charge preferred against the accused in the Magistrates Court at Melaka was for being in possession of 0.10 grams of morphine on 25 July 1997 in contravention of s 12(2) of the Dangerous Drugs Act 1952 and punishable with a fine not exceeding RM20,000 or imprisonment for a term not exceeding five years or to both.

The accused pleaded guilty to the charge when it was read and explained to him. He understood the nature and consequences of his plea. He admitted the facts of the case as presented by the prosecution and the learned magistrate accepted his guilty plea. In his plea in mitigation the accused prayed for leniency in view of his guilty plea. He had 22 previous convictions. The first was in 1973 and the last in 1994. Seven of the previous convictions were drug related while most of the remaining ones were for theft. The last conviction on 3 December 1994 was for possession of dangerous drugs for which he was sentenced to 36 months' imprisonment. Accordingly, the prosecution prayed for a deterrent sentence as the previous convictions did not seem to have had any effect on him. The learned magistrate convicted the accused and imposed a sentence of 30 months' imprisonment from the date of his arrest to be followed by police supervision for 12 months. The prosecution appealed against this sentence.

In his grounds of judgment the learned magistrate advanced five reasons to justify the sentence that he had imposed. They are:

(1) the accused has been free from any conviction since his last conviction on 3 December 1994;

(2) the term of imprisonment ordered is to be followed by an order for police supervision; A

(3) the accused has been in remand from the date of his arrest;

(4) the guilty plea of the accused has saved the time and expense of the court, the prosecution and the witnesses; and

(5) the weight of the drugs in the amended charge was lesser than in the original charge, that is to say, it was reduced from 2.4 grams to 0.10 grams after analysis by the Chemistry Department. B

In his submission before me, the learned Deputy Public Prosecutor contended that the reasons given by the learned magistrate in support of the sentence that he had imposed are wrong in law. He said that the learned magistrate's view that the accused has been free from crime for the last three years is incomprehensible as the accused was in prison for a greater part of that period. He referred to *Re Bakar bin Ahmad* [1959] MLJ 256 and said that the order for police supervision should not have been considered as a ground for imposing the sentence. He said that the manner of treating the accused's period in remand in imposing the sentence was wrong. He concluded by saying that the learned magistrate had failed to take public interest into consideration in imposing the sentence. The accused prayed that the sentence imposed on him be not disturbed. C D

The principles governing an appeal against sentence are well settled. It has been laid down that an appellate court will not interfere with the sentence imposed unless the magistrate has proceeded on wrong principles or has given undue weight to some of the evidence (see *R v Leo De Cruz* [1935] MLJ 1). If a sentence is excessive or inadequate to such an extent as to satisfy an appellate court that when it was passed there was a failure to apply the right principles, then intervention by the court is justified (see *Abu Bakar bin Alif v R* [1953] MLJ 19). As Gordon-Smith J said in *R v Teo Cheng Lian* [1949] MLJ 170 at p 171: E F

> There must be a manifest error, either in law or in considering the facts and circumstances of the case or an omission to consider such facts and circumstances, before the higher court interferes with the discretion undoubtedly vested in the lower court. G

Section 173(b) of the Criminal Procedure Code provides that if the accused pleads guilty to the charge, whether as originally framed or as amended, the plea shall be recorded and he may be convicted thereon and the court shall pass sentence according to law. The phrase 'pass sentence according to law' in the sub-section means that the sentence imposed must not only be within the ambit of the punishable section but it must also be assessed and passed in accordance with established judicial principles (see *Re Chang Cheng Hoe & Ors* [1966] 2 MLJ 252; *PP v Jafa bin Daud* [1981] 1 MLJ 315; *Philip Lau Chee Heng v PP* [1988] 3 MLJ 107). H

I shall now consider whether the five grounds which influenced the learned magistrate to impose the sentence that he did accord with established legal principles in passing sentence. I

That the accused was free from crime for a period of three years after the last conviction

In appropriate cases the fact that an accused person has had a clean record since his last conviction may operate as a mitigating factor. I had occasion to consider this principle in *Zaidon Shariff v PP* [1996] 4 CLJ 441 where I said at pp 447–8:

> In any event the fact that there has been a ten-year gap in the appellant's criminal record has not been duly appreciated by the learned magistrate. The appellant's clean record since his last conviction in 1986 ought to have operated as a mitigating rather than as an aggravating factor. The rationale of the gap principle is that the offender has made an effort to rehabilitate himself and it should, accordingly, operate in his favour. In this regard, DA Thomas in his book entitled *Principles of Sentencing* said at p 179:
>
> > 'The fact that an offender who has a criminal record has made an effort to "go straight" since his last conviction or release from prison normally counts as a substantial mitigating factor if he subsequently commits an offence. In the case where the previous offences were trivial and committed in the long distant past, the court will normally disregard them entirely and treat the offender as a man of previous good character. Where the previous convictions are more numerous or are for offences of a more serious character, the existence of a period free from conviction immediately before the commission of the present offence still has substantial mitigating effect. Clearly, the longer the period, the more effect it will have in mitigating, but while in some of the cases illustrating this point the period may be as long as twelve years, the court will normally give credit for much shorter periods. In *Rosa*, a man of 41 sentenced to four years for house breaking had ten previous convictions for dishonesty and violence, and had on one occasion been sentenced to seven years' imprisonment for wounding with intent. After his release from this sentence he had married, and in the following four years had been convicted only once in respect of a minor offence for which he was fined, and achieved a work record which was 'distinctly to his credit'. In view of the appellant's effort to reform, the sentence was reduced to two years' imprisonment.
>
> The gap principle has received judicial recognition in a plethora of cases. See, for example, *R v Nuttall* (1908) 1 Cr App Rep 180 and *R v Bibbings* (1918) 13 Cr App Rep 205. In *R v Goodwin and Wilkinson* (1910) 12 Cr App Rep 85, it was held that a period of honest work between the termination of a sentence and subsequent conviction ought to be taken into account in passing sentence for the latter.'

It is therefore clear that the gap principle is activated only after the termination of the last prison sentence. This is logical as it is only then that there can be an opportunity to determine whether the offender has made an effort to rehabilitate himself. It is ludicrous to take into account the time spent in prison for this purpose as there would have been no opportunity to commit an offence during that period for obvious reasons. The learned magistrate has taken into account the period from the date the prison term was imposed in sentencing the accused. This is clearly wrong in law.

Order of police supervision

The law relating to an order for police supervision was stated by Rigby J in *Re Bakar bin Ahmad* [1959] MLJ 256 in the following terms:

> Police supervision should not be imposed by way of an additional punishment. Its sole object and only justification, as I understand it, is to ensure that in the interests of public security the Police are in a position to exercise some measure of control over the movements and activities of persons of known bad character — such as burglars, pickpockets and common thieves — who habitually and consistently lead a life of criminal dishonesty.

Whilst I do not dispute that an order for police supervision can be made in the case of persistent drug offenders, the order made by the learned magistrate in this case is anchored on wrong principles. The fact that he has taken the order for police supervision into account in assessing sentence means that he has considered it as a form of punishment thereby influencing him in the prison term that he imposed. This is wrong in law.

Period in remand

The learned magistrate has taken into account the period of remand of the accused prior to his conviction in imposing sentence and has at the same time ordered the imprisonment term to commence from the date of arrest. Section 282(d) of the Criminal Procedure Code provides that every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs. Such a direction may include an order that a sentence of imprisonment is to take effect from the date on which the offender was arrested. The exercise of this power is discretionary (see *Sinniah Pillay v PP* [1992] 1 SLR 225). A court may also make some allowance in imposing sentence where the accused has spent a long time in custody while awaiting trial (see *R v Layton* (1959) Crim LR 61; *R v Newman* (1959) Crim LR 138; *R v Yakimovitch* (1960) Crim LR 66). The exercise of this power is again discretionary and thus I would not agree, with respect, with the view expressed in *Lian Kian Boon v PP* [1991] 1 MLJ 51 (at p 55) '... that in the ordinary course of events the period of his detention should have been taken into consideration and deducted from the sentence of 12 months.' In my opinion a period of remand can therefore operate in favour of an offender in only one of the two following ways. If the sentence of imprisonment is to take effect from the date it was passed then the period spent in remand may be considered in assessing the prison term. If that course is adopted then the prison term cannot be ordered to take effect from the date of arrest. If the period spent in remand is not taken into account in assessing sentence then the sentence of imprisonrnent imposed may be ordered to take effect from the date of arrest. A consideration of the period in remand in assessing sentence followed by an order that the sentence of imprisonment is to take effect from the date of arrest amounts to double credit being given for the same factor. This is wrong in law.

The guilty plea

I agree that generally stated a plea of guilt should be considered as a mitigating factor as it not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses (see *Sau Soo Kim v PP* [1975] 2 MLJ 134). However, in my opinion, a guilty plea ought to be considered in favour of the accused only when all other factors and circumstances surrounding the commission of the offence justify such a consideration. As I observed in *PP v Govindnan a/l Chinden Nair* [1998] 2 MLJ 181 at p 192:

> Its application in favour of the accused depends on the circumstances of each case (see *Wong Kai Chuen Philip v PP* [1991] 1 MLJ 321). In *PP v Low Kok Wai* [1988] 3 MLJ 123, Mohamed Dzaiddin J (as he then was) said at p 124:
>
> > '... In the present case, the only mitigating factor is the accused's plea of guilty. It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused has pleaded guilty. The extent to which a plea of guilty is a mitigating factor must depend on the facts of each case, and it cannot be a powerful mitigating factor when effectively no defence to the charge was available to the accused (see Archbold (42nd Ed) para 4-480 citing *R v Davis* (1980) 2 Cr App R (s) 168).'
>
> The severity of the offence committed may outweigh the mitigating effect of a guilty plea (see *Lee Say & Ors v PP* [1985] 2 CLJ 155; *Loh Hock Seng v PP* [1980] 2 MLJ 13; *PP v Oo Leng Swee & Ors* [1981] 1 MLJ 247). Where public interest demands a deterrent sentence in the circumstances of a particular case, then the effect of such a plea must also give way. In this regard, I refer to *R v Costen* (1989) II Cr App R (S) 182 where Lord Lane said at p 184:
>
> > 'But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances, a plea of guilty may not result in any discount.'
>
> Thus, there can be no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment.

In this case there was virtually no defence available to the accused as the drugs, the subject matter of the offence for which he was charged, were recovered from his pocket. His list of previous convictions also show that he has exhausted the mitigating factors that he had in his favour. In this regard I refer to *Govindnan* where I said at p 191:

> Where a person is found to be a persistent offender, then it is in the interest of justice that a deterrent sentence should be passed (see *PP v Jafa bin Daud* [1981] 1 MLJ 315). This does not mean that a person with previous convictions is not entitled to lenient treatment. But where a person's previous convictions increase progressively, the mitigating factors in his favour diminish correspondingly and may even be exhausted. In this regard, useful reference may be made to *Principles of Sentencing* by DA Thomas where the learned author says at p 176:

> 'The mitigating effect of good character is not, as has been argued already, confined to the man with no previous convictions; the true position is that it diminishes as the offender's criminal record increases, until it reaches a point at which it is exhausted.'

It is therefore my view that the learned magistrate has given undue weight to the guilty plea of the accused.

Difference between the weight of the drugs in the original and amended charge

I am unable to comprehend how the reduction of the weight of the drugs in the amended charge can amount to a factor to be considered in assessing sentence. It is the right of the prosecution to amend the charge and, accordingly, to treat the exercise of that right as affecting the sentence to be passed is a gross miscarriage of justice.

In the circumstances it was my view that the learned magistrate had acted on wrong judicial principles in imposing sentence on the accused. The order made by him therefore demanded intervention by this court. In doing so I considered the long and well established principle of sentencing that the legislature in fixing the maximum penalty for a criminal offence intends it only for the worst cases (see *Sia Ah Kew & Ors v PP* [1974] 1 MLJ 125). This was such a case. I was of the view that on the facts of this case the maximum term of imprisonment prescribed by the section under which the accused had been charged should be imposed on him. Accordingly, I set aside the orders made by the learned magistrate and substituted them with imprisonment for a term of five years from the date of arrest of the accused.

Appeal allowed.

Reported by Andrew Christopher Simon